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SERVICE DATE – APRIL 5, 2012

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35438

EIGHTEEN THIRTY GROUP, LLC—ACQUISITION EXEMPTION—IN ALLEGANY COUNTY, MD

Docket No. FD 35437

GEORGES CREEK RAILWAY, LLC—OPERATION EXEMPTION—IN ALLEGANY COUNTY, MD

Docket No. FD 35436

DUNCAN SMITH AND GERALD ALTIZER—CONTINUANCE IN CONTROL EXEMPTION—EIGHTEEN THIRTY GROUP, LLC AND GEORGES CREEK RAILWAY, LLC

Digest:[1] The Board denies James Riffin's motion to dismiss these proceedings for lack of jurisdiction and Riffin's and Lois Lowe's motions to reject as void three prior authorizations permitting: (1) Eighteen Thirty Group, LLC, to acquire a line of railroad in Allegany County, Md.; (2) Georges Creek Railway, LLC, to operate the line; and (3) Duncan Smith and Gerald Altizer to continue in control of Eighteen Thirty Group and Georges Creek Railway upon those firms becoming rail carriers (collectively Respondents). The Board also denies Respondents' request that Riffin be ordered to cease representing Lowe and grants Riffin's and Lowe's request that Respondents' attorney be ordered to cease representing them before the Board in any matter relating to the line.

Decided: April 4, 2012

INTRODUCTION

In August 2005, CSX Transportation, Inc. (CSXT), filed for permission to abandon the Georges Creek Branch a dormant rail line in western Maryland, extending between milepost BAI 27.0 near Morrison and milepost BAI 18.46 at the end of the track near Carlos, a distance of 8.54

[1] The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

miles in Allegany County, Md. (the Line).[2] Before the Line was abandoned, however, CSXT agreed to sell the Line to "WMS" or "WMS, LLC," which later referred to itself as Western Maryland Services, LLC. The Board approved the sale and dismissed CSXT's abandonment filing. Before the sale could take place, WMS's financing fell through. James Riffin agreed to provide the required financing in exchange for a nearly complete ownership interest in WMS. Riffin paid CSXT the purchase price, and WMS asked for Board permission to substitute Riffin for WMS as the purchaser. While the substitution request was pending, CSXT issued the deed to the Line to "WMS, LLC, a Maryland Limited Liability Company." Riffin claimed that CSXT had deeded the Line to the wrong entity, but he was unsuccessful in forcing CSXT to redeed the Line to him. When Riffin subsequently filed for personal bankruptcy, the trustee of his bankruptcy estate claimed equitable title to the Line, and, subject to approval of the bankruptcy court, reached an agreement to sell the Line to Eighteen Thirty Group, LLC (Eighteen Thirty).

The trustee's agreement to convey the Line to Eighteen Thirty prompted a number of filings before the Board to satisfy the requirements of the Interstate Commerce Act: (1) Eighteen Thirty sought permission to acquire the line; (2) Georges Creek Railway, LLC (Georges Creek), a corporate affiliate of Eighteen Thirty, sought permission to operate the line; and (3) Duncan Smith and Gerald Altizer, the owners of Eighteen Thirty and Georges Creek, sought permission to continue in control of those entities upon their becoming rail carriers. Over the objections of Riffin and one of his business associates, Lois Lowe, the Board approved the three requests.

Riffin and Lowe now seek to undo the Board's approval of these requests. Riffin has moved to dismiss the filings by Eighteen Thirty and Georges Creek on jurisdictional grounds. Riffin and Lowe have also asked the Board to reject the filings of Eighteen Thirty, Georges Creek, and Smith and Altizer, using a series of arguments that the filings contained false and misleading information.

Eighteen Thirty, Georges Creek, and Smith and Altizer (collectively, Respondents) responded to these arguments on the merits and raised an ancillary issue, that Riffin has engaged in the unauthorized practice of law before the Board. Respondents ask that Riffin be ordered to stop representing Lowe.

As explained later in this decision, we are denying Riffin's motion to dismiss these proceedings and Riffin's and Lowe's motions to reject Respondents' three filings, as noted above. We also are denying Respondents' request that Riffin be ordered to cease representing Lowe. Finally, we are granting in part and denying in part a number of other procedural requests, including Riffin's and Lowe's request that the Board order Respondents' attorney to cease representing them before this agency in any matter relating to the Line.

[2] See CSX Transp., Inc.—Aban. Exemption—in Allegany Cnty., Md., AB 55 (Sub-No. 659X) (STB served Oct. 26, 2005). Hereinafter, CSX Transp., Inc.—Aban. Exemption—in Allegany Cnty., Md., Docket No. AB 55 (Sub-No. 659X), will be referred to as "CSXT—Allegany County" or "AB 55 (Sub-No. 659X)."

BACKGROUND

CSXT's Sale of the Line. As explained above, six years ago, CSXT sought Board approval to abandon the Line by filing a notice of exemption. On September 8, 2005, an entity represented by attorney John Heffner and identifying itself as "WMS, LLC" late-filed a formal expression of intent to file an offer of financial assistance (OFA) under 49 U.S.C. § 10904 and 49 C.F.R. § 1152.27.[3] The parties now before us agree that "WMS, LLC" was an acronym for a company chartered in West Virginia called "Western Maryland Services, LLC," although no one informed the Board of this at the time. (For purposes of clarity, we will refer to this entity as "WMS" for the remainder of this decision.) CSXT filed a reply stating that it did not oppose the request filed by WMS.

The Board accepted WMS's September 8, 2005 notice of intent and tolled the time for it to file an OFA, to allow WMS to seek further information for preparing an OFA.[4] On October 21, 2005, WMS, again referring to itself as "WMS, LLC," filed an OFA to purchase the Line for $360,610. Instead of clarifying that WMS, LLC, was an acronym for the company that carried the longer name "Western Maryland Services," the OFA stated that "WMS is a Maryland limited liability company established by Gerald Altizer and chartered in West Virginia for the purpose of acquiring, preserving, and operating light density rail lines in Maryland and contiguous areas in Pennsylvania and West Virginia," and specifically referred to Altizer as "WMS' owner."[5]

The OFA also identified the sources of WMS's financing for the proposed acquisition of the Line. Based on this information, on October 26, 2005, the Board found WMS financially responsible and postponed the effective date of the abandonment to give the parties an opportunity to negotiate a voluntary sale. On November 21, 2005, Heffner filed a letter with the Board stating that WMS had agreed to CSXT's purchase price for the Line. The Board authorized WMS to acquire and operate the Line and dismissed CSXT's notice of exemption to abandon the Line, effective upon consummation of the sale.[6]

Subsequently, part of WMS's financing for the acquisition failed to materialize, and Altizer negotiated with Riffin, who agreed to provide the necessary financing in exchange for a 98% interest in WMS and the company's right to acquire the Line.[7] Meanwhile, CSXT and

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[3] Petition to Toll Time for Filing OFA filed in AB 55 (Sub-No. 659X), Sept. 8, 2005.

[4] See CSXT—Allegany County, (STB served Sept. 23, 2005).

[5] OFA filed in AB 55 (Sub-No. 659X), Oct. 21, 2005), at 2, 7.

[6] See CSXT—Allegany County, (STB served Dec. 14, 2005).

[7] See Motion to Compel filed in AB 55 (Sub-No. 659X), Jan. 14, 2008, at 2.

WMS negotiated a purchase and sale agreement, which was executed on March 1, 2006,[8] the same day Riffin states that he acquired control of WMS.[9]

Riffin has since claimed that in May 2006, he realized that: (1) the OFA filings in 2005 had referred to the entity submitting the OFA as WMS, LLC; (2) Altizer and Heffner in their filings had "used the acronym 'WMS' without first indicating 'WMS' was an acronym for "Western Maryland Services"; and (3) the Board's December 2005 decision had authorized "WMS LLC" to acquire the Line.[10] Riffin further claims that, at the time of the Board's decision in December 2005, there was no legal entity, either in West Virginia or Maryland, named "WMS LLC," but rather only the West Virginia-based "Western Maryland Services, LLC."[11] Thus, according to Riffin, he took action on May 26, 2006, to charter in Maryland a new legal entity, "WMS, L.L.C," with Riffin as its sole owner.[12] (In this decision, we refer to this Maryland-based entity as "WMS-Maryland" to distinguish it from the West Virginia-based WMS.).

Subsequently, in June 2006, WMS—still represented by Heffner—sought Board approval under 49 C.F.R. § 1152.27(i) to substitute Riffin, its corporate affiliate, in the place of WMS as the purchaser of the Line. Referring to itself for the first time as "WMS, LLC a/k/a Western Maryland Services, L.L.C.," WMS stated that: (1) it was owned 98% by Riffin and 1% each by Altizer and another individual; (2) Riffin would provide all funds for the purchase of the Line as well as the working capital; and (3) Riffin was a corporate affiliate of WMS and was a financially responsible person in his own right.[13]

In June 2006, while this substitution request was pending, Riffin wired CSXT the balance of the purchase price. CSXT then sought to consummate the transaction. It issued a quitclaim deed for the Line to "WMS, L.L.C., a Maryland limited liability company," and filed a letter on July 10, 2006, notifying the Board that it had done so, although, as explained below, that deed was never recorded.[14] On August 18, 2006, the Board granted the request to allow Riffin to be substituted for WMS as the purchaser of the Line, stating: "Because Mr. Riffin is a corporate affiliate of WMS, and has demonstrated himself to be financially responsible in his own right, the substitution of WMS for Mr. Riffin will be permitted."[15]

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[8] Id.

[9] See Riffin Comments filed in FD 35438, Nov. 3, 2010, at 9-10.

[10] Motion to Compel filed in AB 55 (Sub-No. 659X), Jan. 14, 2008, at 3.

[11] Id.

[12] Id.

[13] Substitution Request filed in CSXT—Allegany County, June 14, 2006, at 2.

[14] James Riffin—Petition for Declaratory Order (Riffin—Petition), FD 35245, slip op. at 2 (STB served Sept. 15, 2009), aff'd per curiam sub nom. Riffin v. STB, No. 09-1277, 2010 WL 4924719 (D.C. Cir. Nov. 30, 2010).

[15] CSXT—Allegany County, (STB served Aug. 18, 2006) slip op at 2.

Riffin's Post-Sale Actions. On January 14, 2008, Riffin filed a motion asking this Board to compel CSXT to reissue the deed to the Line to him in his own name as an individual. In the motion, Riffin attempted to justify the forced reissuance on the grounds that there had been a mistake concerning "WMS" throughout most of the OFA process. Specifically, Riffin argued to the Board that: (1) although the initial pleadings did not identify it as such, "'WMS LLC' was an acronym for 'Western Maryland Services, L.L.C., a **West Virginia** Limited Liability Company;" (2) "'*WMS, L.L.C., a **Maryland** limited liability company,' **did not exist** on December 14, 2005*, the date the Board granted 'WMS LLC' authority to acquire and operate the Line"; (3) Riffin acquired the 98% ownership interest in "Western Maryland Services, LLC, a **West Virginia** Limited Liability Company" in or around February 2006; and (4) "[o]n **May 26, 2006**, Riffin had the legal entity 'WMS, L.L.C.' chartered in Maryland [and that] Riffin is the sole owner of 'WMS, L.L.C., a **Maryland** limited liability company.'"[16] CSXT opposed the motion.[17] The Board denied Riffin's motion to compel, stating that "[a]ny disputes relating to the validity of the purchase agreement or the transfer of the deed involve questions of state contract and property law. The Board is not the proper forum to resolve such disputes."[18] Riffin challenged unsuccessfully that decision in court.[19]

Riffin now asserts that, between October 14, 2008, and May 5, 2009, while his court challenge was pending, he transferred various amounts, totaling 96%, of the "track and right-of-way of the Line, whether held by WMS LLC, Western Maryland Services LLC or James Riffin," to Lowe and three other individuals, and that on January 5, 2010, Lowe acquired a "controlling interest (51%) in WMS LLC, in Western Maryland Services LLC, and now has an undivided 51% in the track material and right-of-way associated with the Line."[20] Riffin neither sought nor obtained Board approval for these transfers.

On May 6, 2009, after Riffin completed the purported transfer of assets to Lowe and the others, he asked the Board to declare that he had previously become a rail carrier in August 2006, when the Board authorized him to be substituted for WMS as the purchaser of the Line. The Board declined, stating that, "although Riffin obtained authority to acquire and operate the Allegany line, he is not a rail carrier because he lacks the ability to provide rail service on that line."[21] The Board also noted that Riffin had rendered a different version of the events relating to the acquisition of the Line in another case. In that case, Riffin had stated that he had deliberately filed the original OFA for the Line in October of 2005 under the pseudonym "WMS" in order to conceal his involvement from Maryland state regulators, whom he suspected

[16] Motion to Compel filed in AB 55 (Sub-No. 659X), Jan. 14, 2008, at 1-3.

[17] See Reply to Motion to Compel, filed in FD 35438, Feb. 4, 2008.

[18] CSXT—Allegany County (STB served Apr. 24, 2008) slip op. at 3.

[19] See Riffin v. STB, No. 08-1208, 2010 WL 606188 (D.C. Cir. Jan. 22, 2010).

[20] Riffin Comments filed in FD 35438, Nov. 3, 2010, at 9-10; see also Lowe Comments filed in FD 35438, Nov. 3, 2010, at 10.

[21] Riffin—Petition, slip op. at 1.

would object to any attempt by him to acquire the Line in any manner.[22] The Board declined to rule on the accuracy of either of these versions, but noted "that this inconsistency undermines Riffin's credibility with the Board."[23]

On January 20, 2010, Riffin filed a voluntary petition for bankruptcy under Chapter 7 of the Bankruptcy Code.[24] In schedules accompanying his bankruptcy petition, Riffin stated that he retained a 4% interest in "WMS, LLC" after transferring a total of 96% of that company to Lowe and three others. The trustee appointed to oversee Riffin's bankruptcy estate determined that Riffin possessed an equitable interest in the Line and arranged for its sale to Eighteen Thirty, subject to approval of the bankruptcy court.[25]

Eighteen Thirty's Acquisition of the Line. According to Respondents, Altizer severed his relationship with Riffin after the Board's August 16, 2006 decision substituting Riffin in the OFA , and Altizer obtained new financing from Smith for the purpose of acquiring the Line. Together they established Eighteen Thirty to pursue the acquisition of the Line after Riffin filed for bankruptcy, and they subsequently reached agreement with the trustee for the sale of the Line. To permit the sale to go forward, Eighteen Thirty, Georges Creek, and Smith and Altizer sought the necessary regulatory approvals from the Board in four filings made on October 19, 2010. Three of the filings were notices of exemption which were to become effective on November 18, 2010: (1) Eighteen Thirty filed a verified notice of exemption under 49 C.F.R. § 1150.31 to acquire the Line;[26] (2) Georges Creek filed a verified notice of exemption under § 1150.31 to operate the Line;[27] and (3) Altizer and Smith filed a verified notice of exemption under 49 C.F.R. § 1180.2(d)(2) to continue in control of Eighteen Thirty and Georges Creek upon their becoming Class III rail carriers[28] (collectively, the Notices). The Board served the Notices on November 4, 2010, and published them in the Federal Register on November 5, 2010.[29] In the fourth filing, Eighteen Thirty sought relief from the statutory 5-year bar in 49 U.S.C. § 10904(f)(4)(A), that prevents the transfer of a rail line sold under the OFA process to anyone other than the carrier from whom it was purchased. See 49 U.S.C. § 10904(f)(4)(A).

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[22] See James Riffin—Petition for Declaratory Order, FD 34997, Motion for Administrative Stay (filed Dec. 17, 2007) at 4 ("On October 21, 2005, Petitioner, knowing full well that if the true identity of the Offerer were to be known, an objection would be filed, filed an Offer of Financial Assistance under the pseudonym WMS (in which Petitioner had a 98% ownership interest), to purchase from CSX[T] the Georges Creek line of railroad CSX[T] had filed to abandon.").

[23] Riffin—Petition, slip op. at 2, n.4.

[24] In re Riffin, No. 10-11248 (Bankr. D. Md. Jan. 20, 2010).

[25] See Notice of Exemption in FD 35438 at 4-5.

[26] See Id.

[27] See Notice of Exemption filed in FD 35437.

[28] See Notice of Exemption filed in FD 35436.

[29] 75 Fed. Reg. 68,397-68,402.

Because CSXT had sold (or attempted to sell) the Line under the OFA process in CSXT—Allegany County, Eighteen Thirty filed a petition in that docket for an exemption from § 10904(f)(4)(A) to permit it to purchase the Line from the trustee of Riffin's bankruptcy estate.[30]

In the ensuing weeks, Riffin and Lowe (Petitioners) sought to block the exemptions from becoming effective. On November 3, 2010, Riffin and Lowe individually filed comments objecting to each of the Notices and to Eighteen Thirty's petition for exemption from § 10904(f)(4)(A). Riffin also filed a motion to consolidate all four proceedings.

On November 8, 2010, Petitioners individually filed motions to stay and to revoke each of the Notices[31] and on November 17, 2010, Respondents filed a joint reply. On November 17, 2010, the Board denied Petitioners' motions to stay the Notices and indicated that it would address their "motions to revoke or reject" in a separate decision. Although the Board had already ruled on their stay motions, Petitioners individually filed replies on December 1, 2010, to Respondents' joint reply.

On December 8, 2010, Riffin filed a motion to dismiss the Notices for lack of jurisdiction. Respondents filed a joint reply on December 21, 2010, and Allegany County, Md. (Allegany), filed a motion for leave to intervene and a reply on December 28, 2010. Riffin filed a reply on January 11, 2011, to Allegany's reply.[32]

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[30] See Petition for Exemption from 49 U.S.C. § 10904(f)(4) filed in AB 55 (Sub-No. 659X), Oct. 19, 2010.

[31] Petitioners incorporated by reference their previously filed comments into their motions to stay and revoke. Although their pleadings are styled as "motions to revoke," Petitioners rely exclusively on rejection criteria and specifically request rejection, asserting that the Notices are void ab initio because they contain material misrepresentations. We will therefore treat them as motions to reject and will not further discuss revocation.

[32] Respondents contend that Petitioners' replies of December 1, 2010, constitute replies to replies and, as such, should be rejected under 49 C.F.R. § 1104.13(c). Both Respondents and Allegany contend that Riffin's motion to dismiss was filed untimely, and they request that it be rejected under § 1104.13(c). Allegany also requests that Riffin's motion to dismiss be rejected as a reply to a reply. Riffin and Lowe request that their replies be accepted, even if they were filed in violation of § 1104.13(c), to provide the Board with a more complete record. In his reply of January 11, 2011, Riffin asserts that his motion to dismiss may not be rejected because the jurisdictional issues contained in it may be raised at any time. In the interest of a more complete record, we are granting Petitioners' requests and accepting their replies into the record. We are also denying Respondents' and Allegany's requests to reject Riffin's motion to dismiss. Finally, we are granting Allegany's motion for leave to intervene. The motion is unopposed, and Allegany is both a party to CSXT—Allegany County and the local government unit within which the Line is located.

In a December 30, 2010 decision,[33] the Board granted Eighteen Thirty's request for an exemption from § 10904(f)(4)(A) to permit it to acquire the Line and denied Riffin's motion to consolidate the four proceedings as it pertained to CSXT—Allegany County.

On February 16, 2011, the U.S. Bankruptcy Court for the District of Maryland approved the sale of the Line to Eighteen Thirty.[34] Eighteen Thirty subsequently notified the Board in a letter filed on March 4, 2011, that it had consummated the sale on March 3, 2011.

DISCUSSION AND CONCLUSIONS

In the motions to dismiss and to reject, Petitioners seek to block Respondents from acquiring and operating the Line. Although the sale has been consummated, these motions are not moot. If, as Petitioners claim, either the Board lacked authority to permit the transactions or the Notices are void ab initio, then Respondents' purchase and operation of the Line would be unauthorized. For this reason, we have reviewed the above motions, and, as discussed below, we are denying them on the merits. In addition, as discussed in the introduction, we are denying Respondents' request that Riffin be ordered to cease representing Lowe, because we conclude that Lowe was representing herself. Finally, we will order Heffner to cease representing Respondents before this agency in any matter relating to the Line, as their interests are adverse to the interests of the attorney's former client, WMS.

1. RIFFIN'S MOTION TO DISMISS

Riffin contends that the Board must dismiss the Notices because it lacks jurisdiction over the transactions. Riffin suggests that, in allegedly deeding the Line to WMS-Maryland, rather than to WMS, CSXT transferred the Line to the wrong entity. Riffin also notes that WMS-Maryland failed to record the deed or to assign it to Riffin.[35] Riffin thus asserts that the Board's jurisdiction only extends to common carrier railroads, and that no common carriers are associated with the Line, because: (1) according to the Board's finding in Riffin—Petition, Riffin is not a rail common carrier; (2) "Western Maryland Services LLC has never acquired legal title to the Allegany Rail Line"; and (3) "WMS LLC, has never sought, nor received, [Board] authority to acquire and operate the Allegany Rail Line [and s]ince the deed from CSX to WMS LLC has never been recorded, WMS LLC does not have legal title to the Allegany Rail Line . . . ."[36]

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[33] See CSXT—Allegany County (STB served Dec. 30, 2010).

[34] See Transcript of Ruling, In re Riffin, No. 10-11248 (Bankr. D. Md. Feb. 16, 2011) (Transcript of Ruling).

[35] In his December 1, 2010 reply at 4, Riffin explains that "WMS LLC did not record the deed because WMS LLC never received authority to acquire or to operate the Allegany Rail Line."

[36] Motion to Dismiss filed in FD 35438 et al. at 5, 12.

Riffin next asserts that "there has been no rail carrier on the Allegany Rail Line since July 10, 2006, the date CSX[T] consummated its abandonment of the Allegany Rail Line."[37] He concludes that "since July 10, 2006, no common carrier railroad has been associated with the Allegany Rail Line, and since . . . 'Jurisdiction extends to common carrier railroads only'. . . . no one has a common carrier obligation with respect to the Allegany Rail Line, then the Line is a 'private line,' and as such **is not subject to the Board's jurisdiction**."[38]

Finally, Riffin argues that the Board must dismiss the Notices for lack of jurisdiction to be consistent with its prior finding, cited in note 22, supra, that Riffin is not a common carrier. In this regard, Riffin asserts that unless the Board reverses itself and finds that he is a rail carrier, then,

> [T]he STB does not have jurisdiction over Riffin, nor does it have jurisdiction over the Allegany Rail Line [and w]ithout jurisdiction, the STB does not have the authority to order Riffin or his transferees to reconvey the property interests that Riffin conveyed [and cannot] enjoin Riffin or his transferees from removing the rails and track infrastructure, then selling those assets so that Riffin can obtain his 4% interest in those assets, and so that the transferees can obtain their 96% interest in those assets, in the form of cash.[39]

Riffin's circular analysis is in error. Once a rail line is part of the national rail system, it falls within the Board's jurisdiction, and it remains so until the Board authorizes the line's abandonment and the abandonment is consummated.[40] Here, CSXT initially sought Board authority to abandon the Line in the original notice of exemption. However, contrary to Riffin's assertion, CSXT never consummated the abandonment. Instead, CSXT negotiated a voluntary sale of the Line under the OFA process. In its letter of July 10, 2006, CSXT reported that it had consummated the Line's sale, and not its abandonment. Indeed, the OFA process itself contemplates a continuation of rail common carrier service in the hands of the entity pursuing an OFA, not an abandonment. Because CSXT never abandoned the Line, it has remained an active line of railroad subject to the Board's jurisdiction.

This conclusion is not altered by any alleged errors in consummating the sale. None of these errors (e.g. the alleged transfer of the Line to the wrong entity or WMS-Maryland's failure to record the deed), whether correctly characterized or not, affected the Board's jurisdiction over the Line. The Board previously granted authority for Riffin to substitute for WMS as the

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[37] Id. at 5.

[38] Id. (citations omitted).

[39] Id. at 6 (footnote omitted).

[40] See, e.g., Hayfield N. R.R. v. Chicago & N. W. Transp. Co., 467 U.S. 622, 633 (1984); Honey Creek R.R.—Petition for Declaratory Order, FD 34869 (STB served June 4, 2008). The Board's jurisdiction extends to rail lines that parties seek to take out of the interstate rail network. A party's actions in ceasing to provide rail operations, or its desire or intent to do so, do not deprive the Board of its jurisdiction to approve the removal of the line from the national rail network.

purchaser under the OFA process. That authorization allowed Riffin to acquire the Line through an OFA, but it did not, and could not, without more, convert Riffin into a rail common carrier. Other steps were necessary for Riffin to complete that process, including perfecting his ownership under applicable state law. Riffin failed to complete those other steps.[41] His failure to become a common carrier, however, did not in any respect remove the Line from the Board's jurisdiction. Parties may not de facto effectuate the abandonment of a rail line by failing to consummate a sale. At all times, the Line has remained subject to the Board's jurisdiction, and Board authorization continues to be required for subsequent transfers or the abandonment of the Line .

2. PETITIONERS' MOTIONS TO REJECT

Under 49 C.F.R. § 1150.32(c), a notice of exemption is void ab initio and will be rejected if it contains false or misleading information. Petitioners claim that the Notices contain material misrepresentations in numerous respects. According to Petitioners, the Notices allegedly misrepresent that: (1) the proposed transactions are not subject to certain environmental review; (2) Riffin was the railroad transferring the Line to Eighteen Thirty; (3) there were no infirmities associated with title to the Line; (4) the trustee could transfer the common carrier obligation for the Line; (5) Smith and Altizer were the proper parties to seek continuance-in-control authority; and (6) there was no conflict of interest in Heffner representing Respondents. In addition, Petitioners assert that the Notices are "controversial" and, for that reason as well, must be rejected.

A number of the bases for Petitioners' rejection arguments distort the Board's "misrepresentation" grounds for rejecting or voiding ab initio a notice of exemption. Petitioner's multiple allegations of false statements in many instances are not based on alleged misrepresentation of specific "facts," but rather on Petitioner's efforts to recast Respondents' different legal interpretation of certain facts as "misrepresentation." Divergent views as to the proper characterization or status of "title," for example, or a dispute over whether an environmental study might be required, would not mean that one or the other party's legal position is a "misrepresentation of fact." Thus, many of Petitioner's assertions do not constitute "facts" that Respondents have "misrepresented," justifying a rejection, but rather are legal claims to be addressed within the context of the filings. In any event, as discussed below, none of these misrepresentation claims, whether factual or instead legal in nature, has merit. Petitioner's requests for rejection will therefore be denied.

Environmental review. Petitioners contend that the Notices falsely claim that the proposed transactions are exempt from environmental review under 49 C.F.R. § 1105.6(c)(2)(i). They argue that Respondents' proposed operation of the Line requires environmental review because it will result in significant changes in carrier operations. Specifically, Petitioners contend that the proposed operation, as discussed in the petition for exemption from 49 U.S.C. 10904(f)(4)(A) that Respondents filed in CSXT—Allegany County, will exceed both the

[41] See supra note 21.

energy threshold of 49 C.F.R. § 1105.7(e)(4)(iv) and the air quality threshold of 49 C.F.R. § 1105.7(e)(4)(v). These contentions lack merit.

The energy threshold in § 1105.7(e)(4)(iv) triggers environmental review when the proposed operation will cause a diversion from rail to motor, resulting in a decrease in overall energy efficiency. Here, however, as Riffin himself concedes, the Line has had no traffic for years. Thus, the only diversion likely to occur from the proposed acquisition and operation of the Line would be from motor to rail. Accordingly, the Notices correctly stated that the proposed transaction would not cause any operational change that exceeds the energy threshold in § 1105.7(e)(4)(iv).

Similarly, under Board precedent, the air quality threshold in § 1105.7(e)(4)(v) applies when the proposed operation will result in a 100% increase in rail traffic or an increase of at least eight trains per day.[42] Riffin contends that, because there has been no rail traffic on the Line, the proposed operation far exceeds the 100% threshold. The 100% threshold, however, cannot sensibly apply to an inactive rail line. Because Petitioners effectively concede that the proposed operation would not exceed the 8-trains-per-day threshold,[43] we conclude that the Notices correctly stated that the proposed action would not exceed the air quality threshold of § 1105.7(e)(4)(v).

The transferor. Petitioners assert that it is Board practice under 49 C.F.R. § 1150.31 to reject notices of exemption that fail to identify the railroad that is transferring the line. Thus, they argue that, "[i]n light of the Board's . . . decision in FD 35245 [finding that Riffin is not a rail common carrier], it was a material misrepresentation for [Eighteen Thirty] to represent that Riffin, or Riffin's bankruptcy trustee, would be the railroad transferring the Line."[44]

However, Eighteen Thirty did not identify Riffin or the trustee of his bankruptcy estate as the railroad transferring the Line. Rather, Eighteen Thirty's notice stated that: (1) the Board had granted Riffin authority to acquire the Line; and (2) the trustee claimed to own an equitable interest in the Line and to have the power to direct the disposition of the Line, subject to the

[42] See Mo. Cent. R.R.—Acquis. & Operation Exemption—Lines of Union Pac. R.R., FD 33508, slip op. at 7 (STB served Apr. 30, 1998) (finding that where there had been no recent traffic on a rail line that would be reactivated, the relevant threshold for environmental review is eight trains per day), aff'd sub nom. Lee's Summit, Mo. v. STB, 231 F.3d 39, 42 (D.C. Cir. 2000).

[43] Petitioners claim that the proposed action would generate about 450-500 carloads per year, less than two carloads per day. See Petition for Exemption from 49 U.S.C. § 10904(f)(4)(A) filed in AB 55 (Sub-No. 659X), at 8.

[44] Riffin Comments filed in FD 35438, Nov. 3, 2010, at 5; Lowe Comments filed in FD 35438, Nov. 3, 2010, at 5.

approval of the bankruptcy court. These statements fully and accurately described the Board's action and the trustee's claim.[45]

Nor was it improper for Eighteen Thirty to use the class exemption from 49 U.S.C. § 10901, where a bankruptcy trustee claimed the equitable power to direct the sale of the Line. To qualify for use of that class exemption, an applicant seeking to acquire and/or operate a rail line under 49 C.F.R. § 1150.32 must file a verified notice of exemption providing details about the transaction, see 49 C.F.R. § 1150.33, and a brief caption summary conforming to the format in 49 C.F.R. § 1150.34. While § 1150.33(e)(1) provides that the notice of exemption must contain "[a] brief summary of the proposed transaction including: (1) The name and address of the railroad transferring the subject property," § 1150.34 provides that the caption summary must specify the name of "[t]he transferor," not the "transferring railroad."

Notwithstanding the wording in § 1150.33(e)(1), the transferor of a rail line need not be a rail carrier to qualify for use of the class exemption. Nor is there a presumption that the transferor of a line is necessarily a rail carrier, simply because the parties to the transaction invoked the class exemption. Under 49 C.F.R. § 1150.31, the class exemption extends to "all acquisitions and operations under section 10901," which includes those acquisitions and operations where the transferor is a noncarrier.[46]

Alleged "Title Infirmities." Petitioners assert that "[i]t was a material misrepresentation for [Eighteen Thirty] not to disclose the infirmities associated with title to the Line."[47] Petitioners do not clearly identify the alleged title infirmities, although we presume they are referring to the fact that CSXT deeded title to the Line to "WMS L.L.C., a Maryland limited liability company, [which] never sought, nor acquired authority to acquire or operate the Line . . . ."[48] This claim appears to be set out more fully in Riffin's motion to compel in CSXT—Allegany County. There Riffin argued that there were two legal infirmities in connection with CSXT's transfer of the deed to the Line: (1) that **"[a]t the time the Notice of Intent was filed, there was no legal entity 'WMS LLC,' either in West Virginia or in Maryland**;" and (2) that "'WMS LLC., a

[45] See Eighteen Thirty—Acquis., Verified Notice of Exemption at 4-5; Transcript of Ruling at 13-14, 22.

[46] See, e.g., Class Exemption for the Acquis. & Operation of Rail Lines under 49 U.S.C. § 10901, 1 I.C.C.2d 810 (1983) ("The NPR proposed to exempt from regulation all acquisitions and operations under 49 U.S.C. 10901, including . . . operation by a new carrier of rail property acquired by a third party . . . ."); Riverview Trenton R.R.—Acquis. & Operation Exemption—Crown Enters., Inc., FD 33980 (STB served and published at 66 Fed. Reg. 1,371 on Jan. 8, 2001); Ohio Valley R.R.—Acquis. & Operation Exemption—Harwood Props., Inc., FD 34486 (STB served and published at 66 Fed. Reg. 21,899 on Apr. 22, 2004).

[47] Riffin Comments filed in FD 35438, Nov. 3, 2010, at 5; Lowe Comments filed in FD 35438, Nov. 3, 2010, at 5.

[48] Riffin Comments filed in FD 35438, Nov. 3, 2010, at 5; Lowe Comments filed in FD 35438, Nov. 3, 2010, at 6.

Maryland limited liability company,' a legal entity [, . . .] **has never received authority to acquire the Line**."[49]

There was nothing false or misleading in Eighteen Thirty not disclosing that CSXT transferred the deed to the Line to "WMS, LLC, a Maryland limited liability company." Eighteen Thirty's notice specifically stated that: (1) the proposed acquisition was a result of Riffin's bankruptcy; (2) the trustee of Riffin's bankruptcy estate asserted that the bankruptcy estate owned the equitable interest in the Line and that the trustee had the power to dispose of the Line; and (3) the trustee had entered into an agreement to sell the Line to Eighteen Thirty, subject to the approval of the bankruptcy court. Petitioners have not shown any of these statements to be false or misleading. As the bankruptcy court later determined after Riffin filed for bankruptcy in January 2010, the unrecorded deed that CSXT had apparently transferred to "WMS, LLC, a Maryland liability company" became "subordinate to the rights of the estate in bankruptcy."[50] Accordingly, when Respondents filed the Notices in October 2010, there was no title infirmity to disclose.

Alternatively, Petitioners' title-infirmity claim may rest on their legal position that there was a defect in the OFA process. In this regard, they claim that: (1) WMS (rather than WMS-Maryland, which Riffin formed in May 2006) received Board authority to acquire and operate the Line; (2) this authority was based on the financial statements of the original investors; (3) WMS had an obligation to inform the Board that it was no longer financially responsible when investors backed out; and (4) the Board had a duty to declare WMS's OFA moot, as it did in Consol. Rail Corp.—Aban. Exemption—Hudson County, N.J. (Conrail—Hudson County), AB 167 (Sub-No. 1190X) (STB served May 17, 2010), when, according to Petitioners, WMS never acquired substitute financing.[51]

This argument erroneously conflates the issue of "title" with the issue of whether our OFA procedures have been followed. OFA proceedings do not confer "title" to real property on entities. Rather, they grant qualified entities the opportunity, under applicable state property law, to acquire property that is subject to an abandonment application. Thus, nothing stated—or not stated—in the parties' filings in these dockets about the status of OFA qualification could be said to constitute a misrepresentation as to "title."

In any event, Petitioners' analogy to Conrail—Hudson County is not on point. In that case, Riffin was pursuing an OFA, but suffered a financial setback as indicated by his filing for personal bankruptcy. For reasons having nothing to do with Riffin's bankruptcy, the Board

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[49] Motion to Compel filed in AB 55 (Sub-No. 659X), Jan. 14, 2008, at 1, 5.

[50] See Transcript of Ruling at 22 ("The old deed, to the extent it somewhere still exists in a drawer, that Mr. Riffin can't find, is void. It appears it was likely issued in error in the first place and subject to corrective rights. It is subordinate to the rights of the estate in bankruptcy and it is of no longer any effect.").

[51] Riffin Comments filed in FD 35438, Nov. 3, 2010, at 5-6; Lowe Comments filed in FD 35438, Nov. 3, 2010, at 6.

exempted that line from the OFA process. But the Board noted that, even if an exemption were not appropriate, bankruptcy was incompatible with the requirement that a party filing an OFA be financially responsible. Here, contrary to Petitioners' claims, WMS *did* secure substitute financing—Riffin himself agreed to provide the required financing in exchange for a 98% interest in WMS.[52]

Authority of the Trustee. Petitioners next argue that "[i]t was a material misrepresentation for [Eighteen Thirty] to represent that Riffin's bankruptcy trustee could convey the common carrier obligation associated with the Line."[53] However, Eighteen Thirty's notice did not state that the bankruptcy trustee could convey the common carrier obligation associated with the Line.[54] The notice stated merely that "[t]he trustee asserts that the bankruptcy estate is the owner of the equitable interest in the Line and that the trustee has the power to dispose of the Line subject to approval from the bankruptcy court."[55] Petitioners have not shown this statement to be false or misleading.

Petitioners also argue that the Board must reject the Notices, which they allege represent that Riffin is a railroad, to remain consistent with the agency's earlier decision in Riffin—Petition. There, the Board concluded that Riffin was not a rail carrier because he lacked legal title to the Line or any other "suitable legal interest" in the Line sufficient to enable him to conduct rail operations. Petitioners assert that, unless the Board rejects the Notices, "the Board

[52] See Riffin Comments filed in FD 35438, Nov. 3, 2010, at 6; Lowe Comments filed in FD 35438, Nov. 3, 2010, at 9; Motion to Compel filed in AB 55 (Sub-No. 659X), Jan. 14, 2008, at 2. Petitioners suggest that, although Riffin agreed to provide the necessary funds for the purchase of the Line from CSXT, this did not constitute substitute financing for WMS, because Riffin insisted as a condition that he obtain the right to be substituted in WMS's place as the acquirer. Riffin Comments filed in FD 35438, Nov. 3, 2010, at 6. This is a distinction without a difference. Riffin paid the entire purchase price at a time when only WMS had Board permission to acquire the Line. And by acquiring a 98% ownership interest in WMS, Riffin necessarily acquired the right to seek substitution.

[53] Riffin Comments filed in FD 35438, Nov. 3, 2010, at 5; Lowe Comments filed in FD 35438, Nov. 3, 2010, at 5.

[54] Indeed, the bankruptcy court, referring to the common carrier obligation, observed that "it's not something the trustee conveys directly. The trustee and this Court doesn't [sic] have that unrestricted power to designate someone as a common carrier. The rights are associated, and if the acquirer both acquires legal title to the property and is approved by the board as a responsible person for that line, then those facts apparently create the status and legal rights of a common carrier over that line, such status and rights never having been abandoned." Transcript of Ruling at 17-18.

[55] Notice of Exemption in FD 35438 at 5.

would tacitly be admitting that Riffin does in fact have, and has had, the common carrier obligations associated with the Line."[56]

This is incorrect. Neither the Notices nor the trustee accepted Riffin's common carrier claim. As Respondents explain, the trustee stated that Riffin's bankruptcy estate had an equitable interest in the Line that allowed the trustee to designate the party to whom CSXT was to issue a replacement deed.[57] Thus, the trustee's claim, which was accepted by the bankruptcy court,[58] is consistent with the Board's determination in Riffin—Petition.

Petitioners next argue that the Notices must be rejected because the bankruptcy estate contained no property related to the Line. Specifically, they assert that,

> WMS L.L.C. has not filed for bankruptcy, that Riffin has conveyed 96% of his interest in the track material and right-of-way to other parties, prior to his filing for bankruptcy . . . that the only thing that is/was a part of Riffin's bankruptcy estate was the 4% interest Riffin retained in the track material and right-of-way . . . that the only thing that is in Riffin's bankruptcy estate is his 4% interest in WMS L.L.C., and thus the only thing that potentially can be conveyed by Riffin's Bankruptcy Trustee is Riffin's 4% interest in WMS LLC, **not** the **Line** or the "track and right of way" [and] that Riffin has exempted his 4% interest in WMS LLC, and thus Riffin's 4% interest **is no longer a part of Riffin's bankruptcy estate**.[59]

These claims over entitlement to, or interest in, any assets in Riffin's bankruptcy estate, however, are for the bankruptcy court to determine. As noted by Riffin in his Motion to Dismiss at 4, the Board's grant of acquisition and/or operation authority is permissive, and not mandatory; it neither determines ownership of, nor creates a real property interest in, a line.[60] Petitioners' disagreement with the trustee over the contents of the bankruptcy estate provides no basis for rejecting the Notices.

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[56] Riffin Comments filed in FD 35438, Nov. 3, 2010, at 5; Lowe Comments filed in FD 35438, Nov. 3, 2010, at 5. This argument echoes that made by Riffin in his Motion to Dismiss. See supra note 36 and accompanying text.

[57] See Respondents Joint Reply of Nov. 17, 2010 at 15.

[58] See supra note 55.

[59] Riffin Comments filed in FD 35438, Nov. 3, 2010, at 4; Lowe Comments filed in FD 35438, Nov. 3, 2010, at 4-5.

[60] See, e.g., General Ry. Corp.—Acquis. Exemption—F&L Realty, Inc., FD 33905, slip op. at 6 (STB served Oct. 22, 2001); MVC Transp., LLC—Exemption for Acquis. of R.R. Line—in Osceola & Dickinson Counties, Iowa, FD 34867, slip op. at 4 (STB served June 15, 2007). A Board authorization, like other licenses issued by the Board, may be considered personal property of the licensee; it is not an interest in real property.

Continuance in-control. Petitioners contend that the notice in FD 35436 falsely claims that Smith and Altizer are the petitioners, arguing that Eighteen Thirty and Georges Creek "will be the carriers [and as a consequence,] should be the 'petitioners,' not Mssrs. Smith and Altizer."[61] Additionally, Petitioners contend that the notice in FD 35436 falsely claims that the proposed continuance-in-control "is not part of a series of anticipated transactions that would connect the railroads with each other." 49 C.F.R. § 1180.2(d)(2). They argue that: (1) Eighteen Thirty and Georges Creek must be connected if they are "to be common carriers on the same line of railroad"; and (2) Respondents are "anticipating" acquiring from CSXT a line that would connect the Line to a line Georges Creek currently operates in Luke, Md., a few miles away from the southern end of the Line.[62]

These contentions lack merit as well. As the owners of Eighteen Thirty and Georges Creek, Smith and Altizer properly filed a notice of exemption from 49 U.S.C. § 11323 pursuant to 49 C.F.R. § 1180.2(d)(2) to continue in control of Eighteen Thirty and Georges Creek upon their becoming rail common carriers. Eighteen Thirty and Georges Creek Railway, however, had no reason to seek a continuance-in-control exemption. They were the entities to be controlled by Smith and Altizer and the proper parties to file for acquisition and operation exemptions under 49 C.F.R. § 1150.31.

Nor did the notice in FD 35436 misrepresent the relationship between Eighteen Thirty and Georges Creek, or otherwise make false claims in violation of the requirements for use of the class exemption, 49 C.F.R. § 1180.2(d)(2). The class exemption is intended to prevent a short line railroad from acquiring a series of contiguous individual lines to create a "system" with significant competitive impacts without the greater regulatory scrutiny afforded by a formal application or an individual petition for exemption. Here, Eighteen Thirty sought to acquire, and Georges Creek sought to operate, the same line—not connecting contiguous individual lines.

Similarly, the notice in FD 35436 did not misrepresent Respondents' anticipated actions. Respondents assert that they have no plans to extend their operations over the CSXT line that would connect the Line to the line in Luke, where Georges Creek performs "private, noncommon carrier plantsite switching service . . . for NewPage Corporation [and that Respondents] have no current plans to extend their operations over CSX[T]'s line . . . as CSX[T] has no plans to dispose of that line."[63]

Conflict of interest. Petitioners contend that the Notices falsely claim that Respondents can be represented by their attorney, John Heffner. According to Petitioners, Heffner may not represent Respondents here, because he represented WMS, WMS-Maryland, and Riffin previously in CSXT—Allegany County. This poses a conflict of interest, Petitioners assert, because Respondents "have a desire to divest Riffin of his common carrier obligation in the Line

[61] Riffin Comments filed in FD 35438, Nov. 3, 2010, at 2; Lowe Comments filed in FD 35438, Nov. 3, 2010, at 2.

[62] Id.

[63] Respondents Joint Reply filed in FD 35438, Nov. 17, 2010, at 10.

and to divest Riffin and the parties Riffin has contracted with, of his and their title and interest to the track material and right-of-way associated with the Line."[64] Further, they claim that there is a high probability that Heffner will be called as a witness in Riffin's bankruptcy proceeding, where he could "invoke the attorney/client privilege to refuse to testify or respond to discovery requests [or] disclose privileged information to those parties, whose interests are adverse to Riffin's interests."[65] Petitioners request that the Board order Heffner to cease representing Respondents in any matter relating to Riffin, WMS-Maryland, WMS, or the Line.

Respondents claim that: (1) Heffner has never represented WMS-Maryland, or Riffin; (2) Heffner has continuously represented Altizer going back to 2005 when Altizer initially tried to acquire the Line; (3) Altizer established WMS to acquire the Line; and (4) Altizer sold Riffin the 98% interest in WMS when part of the financing to acquire the Line fell through. Further, Respondents assert that Heffner continued to represent Altizer and WMS, both in negotiations with CSXT and before the Board during this period.[66] Acknowledging that Heffner filed the motion in 2006 to substitute Riffin for WMS as the purchaser of the Line, Respondents claim that Heffner "advised Mr. Riffin that he represented Mr. Altizer and not Mr. Riffin but that he would handle the substitution filing as a courtesy."[67]

We conclude that the Notices contain no materially false or misleading information concerning Heffner's ability to represent Respondents. In this regard, the Notices represent, at most, that Heffner has Respondents' permission to represent them, which, as far as the record reveals, he did.[68] The Notices state nothing about whether Heffner has a conflict of interest in

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[64] Riffin Comments filed in FD 35438, Nov. 3, 2010, at 7; Lowe Comments filed in FD 35438, Nov. 3, 2010, at 7. Contending that 96% of the track material and right-of-way belongs to Lowe and others, and that the remaining 4% belongs to Riffin and has been exempted from his bankruptcy estate, Petitioners assert that "[n]one of these parties have consented, nor will they consent, to the transfer of the underlying real estate and track material to Mssrs. Smith and Altizer without compensation, which Mssrs. Smith and Altizer have not offered." RiffinMotion to Stay and to Revoke at 3; Lowe Motion to Stay and to Revoke at 3 The compensation Smith and Altizer paid to acquire the Line went to Riffin's bankruptcy estate. This dispute is with the trustee and the bankruptcy court and is best left to them to resolve. See also Transcript of Ruling at 20-21 ("Whatever interests others held in the rights of this line, as of the [bankruptcy] petition date, will attach to the proceeds of sale and must be determined within the framework of an adversary proceeding . . . . There is such an adversary proceeding pending, and it's not before the Court for decision today.").

[65] Riffin Comments filed in FD 35438, Nov. 3, 2010, at 7; Lowe Comments filed in FD 35438, Nov. 3, 2010, at 7-8.

[66] See Respondents Joint Reply filed in FD 35438, Nov. 17, 2010, at 16-17.

[67] Id. at 17.

[68] Cf. Arthur W. Single II—Continuance in Control Exemption—Charlotte S. R.R., FD 35253, slip op. at 2 (STB served Mar. 4, 2011) (rejecting notice of exemption because it "purports to be filed on behalf of a party who did not authorize, and indeed was not even aware of, its filing").

representing Respondents, which is more in the nature of a legal interpretation, rather than a factual representation.

Although we find this argument for rejecting the Notices unpersuasive, Petitioners raise a valid representation issue. Under the Board's Canons of Ethics, a practitioner may not represent conflicting interests, except by express consent of all concerned, given after a full disclosure of the facts. See 49 C.F.R. § 1103.16(b). The problem here is not that the Respondents' interests conflict with each other, but rather that they conflict with the interests of Heffner's former client, WMS. The Canons of Ethics, at 49 C.F.R. § 1103.16(c), address conflicts that arise when the interests of a new client would conflict with those of a former client:

> The obligation to represent the client with undivided fidelity and not to divulge secrets or confidence forbids also the subsequent acceptance of retainers or employment from others in matters adversely affecting any interest of the client with respect to which confidence has been reposed.

Here, § 1103.16(c) prohibits Heffner from continuing to represent Respondents in their efforts to acquire and operate the same line of railroad that his prior client, WMS, sought to acquire and operate. Although Respondents argue persuasively that Heffner did not represent Riffin or WMS-Maryland,[69] they concede that Heffner represented WMS.[70] Respondents offer no explanation for how Heffner could, consistent with the Board's rules, represent them in their effort to acquire and operate the Line after he had represented WMS, which also sought to acquire and operate the Line, and which was 98% owned by Riffin. It would serve no purpose to reject the Notices based on this finding, other than to penalize Respondents, who are guilty of no misstatement or other intentional violations of Board regulations.[71] However, we will direct Heffner to cease any further representation of Respondents before the Board on matters involving the Line.

Controversy. Finally, Petitioners argue that the Notices should be rejected because they are controversial and because the time constraints associated with the notice of exemption process, 49 C.F.R. § 1150.31, do not permit the development of a sufficient record in these

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[69] We find no merit to Riffin's assertion that Heffner represented him or WMS-Maryland. While Heffner handled the June 14, 2006 substitution filing by WMS and Riffin in CSXT—Allegany County, Riffin was advised by Heffner that he represented Altizer, but would handle the substitution filing for Riffin as a courtesy. Heffner's account is corroborated by the substitution filing itself where Heffner identified himself as counsel only for "WMS, LLC a/k/a Western Maryland Services, L.L.C.," and not for Riffin.

[70] See Respondents Joint Reply filed in FD 35438 et al., Nov. 17, 2010, at 16 ("In exchange for a cash infusion, Mr. Altizer sold Mr. Riffin a 98% interest in [WMS]. The undersigned counsel [Heffner] continued to represent Mr. Altizer and [WMS] in negotiations with CSX and before the Board during this period.").

[71] Indeed, nothing in the record suggests that Respondents benefitted from any client confidences that WMS may have entrusted to Heffner.

circumstances. The notice of exemption process is an expedited means of obtaining Board authority in certain classes of transactions, defined in the Board's regulations, that ordinarily do not require greater regulatory scrutiny. Notices of exemption are intended to be used for routine and non-controversial cases. Notices that contain unresolved issues or questions that require considerable scrutiny may be rejected.[72]

Here, however, Petitioners have not identified any reasonable basis for viewing the transactions pursuant to the bankruptcy process as controversial.[73] As explained above, Petitioners' opposition rests on their misreading of both the Notices and the Board's regulations. The mere fact that Petitioners found numerous ways to misread these materials does not establish the presence of issues that require "considerable scrutiny." Nor does their opposition to the Notices, without more, suffice to make the Notices controversial so as to require rejection.

In sum, because Petitioners have failed to demonstrate anything false, misleading, or controversial in or about the Notices, their motions to reject will be denied.

3. RESPONDENTS' UNAUTHORIZED PRACTICE OF LAW ALLEGATION

Respondents contend that, with respect to the filings submitted by Lowe, Riffin appears to be engaged in the unauthorized practice of law before the Board. They observe that "[t]he filings made under her [Lowe's] name appear to be more or less identical to those submitted by Mr. Riffin in both content and even typographical style and format."[74] In addition, Respondents point out that Riffin served both his and Lowe's pleadings on Respondents' counsel in an envelope that bears Riffin's return address and contains sufficient postage for both sets of pleadings.[75] Respondents request that the Board require Riffin to cease representing other parties, including Lowe, and to require Lowe to obtain independent representation if she wants to continue submitting filings.

Riffin responds that the Board in Norfolk Southern Ry.—Petition for Exemption—in Baltimore City & Baltimore County, Md., AB 290 (Sub-No. 311X) (STB served Mar. 22, 2010) (Norfolk Southern), objected to Lowe and others participating in that proceeding by "merely adopting by reference whatever Riffin pleaded [and i]nstead, mandated that these individuals

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[72] See ABC & D Recycling, Inc.—Lease and Operation Exemption—A Line in Ware, Mass., FD 35397, slip op. at 4 (STB served Jan. 20, 2011); see also Ohio Valley R.R.—Acquis. & Operation Exemption—Harwood Props., Inc., FD 34486, slip op. at 4 (STB served Feb. 23, 2005) ("[W]e may reject a notice . . . if the transaction engenders substantial controversy.").

[73] Petitioners' argument is limited to the following statement: "Riffin will be involved in this proceeding. This proceeding will become (it has already become) highly controversial." Riffin Comments filed in FD 35438, Nov. 3, 2010, at 1; Lowe Comments filed in FD 35438, Nov. 3, 2010, at 1.

[74] Respondents Joint Reply filed in FD 35438 et al., Nov. 17, 2010, at 17.

[75] Id., Ex. C.

prepare separate full-length pleadings, signed by each individual, which they did."[76] According to Riffin,

> [t]hese individuals have made it clear that they will be filing separate, but virtually identical pleadings with the Board, signed by each individual individually. Riffin has given Ms. Lowe [and others] permission to not only adopt verbatim whatever Riffin writes, but also to plagiarize whatever Riffin writes [, and that] Riffin does not advise these individuals what to write. He merely gives them an advance copy of what he has written.[77]

Lowe reiterates Riffin's contentions, asserting that she has "chosen to adopt, with Mr. Riffin's permission, virtually verbatim, what Mr. Riffin has scribed. This has been done for my convenience and efficiency."[78]

In Norfolk Southern, the Board granted a motion to strike the notices of intent to participate and to file an OFA that Riffin had filed on his own behalf and on behalf of Lowe and other named individuals. Referring to a previously issued protective order in the proceeding, the Board stated that: (1) "under 49 CFR 1103.2 and 1103.3, Riffin may only represent himself, as he is neither a licensed attorney nor practitioner approved to practice before the Board"; and (2) "under 49 CFR 1104(4)(b), a document not signed by a practitioner or attorney must be accompanied by the signer's address."[79] Here, Lowe's pleadings do not violate the filing requirements of § 1104(4)(b) as set forth in Norfolk Southern. Her pleadings are separate from Riffin's, and she has signed and verified them. Accordingly, we will deny Respondents' request that Riffin be ordered to cease representing other parties and that Lowe be required to obtain independent representation.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. Allegany's motion for leave to intervene is granted.

2. Petitioners' replies of December 1, 2010, and Riffin's reply of January 11, 2011, are accepted into the record.

3. Respondents' and Allegany's requests that Riffin's motion to dismiss be rejected are denied.

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[76] Riffin Reply, Dec. 1, 2010, at 2.

[77] Id. at 2-3.

[78] Lowe Reply, Dec. 1, 2010, at 2-3.

[79] Norfolk Southern, slip op. at 3.

4. Riffin's motion to dismiss the proceedings on jurisdictional grounds is denied.

5. Petitioners' motions to reject the three Notices are denied.

6. Petitioners' request that Heffner be ordered to cease representing Respondents in any matter relating to the Line is granted.

7. Respondents' request that Riffin be ordered to cease representing Lowe and that Lowe be required to obtain independent representation is denied.

8. This decision is effective on its service date.

By the Board, Chairman Elliott, Vice Chairman Mulvey, and Commissioner Begeman.